83-483

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

HYDROCULTURE, INC.,

Petitioner,

v.

COOPERS & LYBRAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Attorneys for Petitioner

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QUESTIONS PRESENTED

1. Did the District Court err in its review of the Bankruptcy Court's conclusions of law?

2. Did the District Court abuse its discretion in upholding the Bankruptcy Court's determination that the liquidation or estimation of petitioner's counterclaim for professional malpractice against respondent would unduly delay the administration of the estate?

3. Did the District Court abuse its discretion in refusing to grant petitioner's request to amend its complaint?

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TABLE OF AUTHORITIES

OPINIONS BELOW

The memorandum opinion in the Court of Appeals in **Hydroculture, Inc. v. Coopers & Lybrand**, No. 82-5287 (9th Cir., June 7, 1983, unpublished memorandum), affirming the District Court's decision, appears as Appendix A. The order of the U.S. District Court for the District of Arizona, in **Hydroculture, Inc. v. Coopers & Lybrand**, No. CIV-81-434-PHX-VAC, B-75-306-L-PHX-ED (February 18, 1982), vacating its January 8, 1982 order and affirming the Bankruptcy Court's decision, appears as Appendix B.

The order of the U.S. District Court for the District of Arizona, **Hydroculture, Inc. v. Coopers & Lybrand**, No. CIV-81-434-PHX-VAC, B-75-306-L-PHX-ED (January 8, 1982), appears as Appendix C. The order of the U.S. Bankruptcy Court for the District of Arizona, **Hydroculture, Inc. v. Coopers & Lybrand**, No. B-75-306-L-PHX-ED (March 2, 1981), dismissing Hydroculture's counterclaim

and denying an amendment to its complaint, appears as Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 7, 1983. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 63(a)(4) and 57(d) of the United States Bankruptcy Act of 1898 (11 U.S.C. § 103(a)(4) and 11 U.S.C. § 93(d) [superseded]), appear as Appendix E.

STATEMENT OF THE CASE

Petitioner Hydroculture is an Arizona corporation[1] engaged in the business of developing and applying hydroponics. Hydroponics is the science of growing plants outside a traditional soil environment.

Respondent Coopers & Lybrand ("C&L") is a national accounting firm.

Prior to and during 1973, Hydroculture employed C&L to provide certain accounting services, including preparation of year-end statements. Significant to the statements were the manner in which C&L was to treat certain Hydroculture leases (L-13). During 1973, C&L unilaterally made changes in the manner in which the leases were to be treated, essentially converting them from assets to liabilities. The result of this change was, obviously, a catastrophic swing in Hydrocul-

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[1] Hydroculture, Inc. has no parent corporation and is the sole petitioner to this Court.

ture's financial picture. The negative financial statement led to a cessation in business activity then ongoing between Hydroculture and potential customers and investors. Hydroculture failed and was forced into bankruptcy (CR 3, p. 2).[2/]

In the bankruptcy proceeding, C&L filed a claim for monies allegedly owed for accounting services provided to Hydroculture. The claim was in the amount of $34,688.65 (CR 3, pp. 2-3).

On November 7, 1975, Hydroculture filed its objections to the claim and, at the same time, made a counter-demand for relief against C&L (L-1).

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2/References in this brief are as follows: Bankruptcy Court record, "L-document number"; District Court record, "CR document, p. ___"; Reporter's Transcript, "RT, date, p. ___"; Excerpt of Record on Appeal, "ER, p. ___".

On June 14, 1976, C&L filed a motion for more definite statement (L-9).[3/]

On July 2, 1976, apparently in response to the motion for a more definite statement, Hydroculture filed a "First Amended Complaint" (L-13). The amended complaint pleaded a professional malpractice action against C&L, citing a breach of contract for professional services as the foundation for the action.

On July 23, 1976, C&L moved to dismiss the complaint (also referred to as "counterclaim") (L-14). C&L's theory was that Hydroculture's counterclaim was a tort claim for unliquidated damages and therefore "not provable" in Bankruptcy Court.

Hydroculture responded to the

3/ The file does not reveal why there was a seven month delay between the time of the Hydroculture demand for relief and the first responsive pleading. Counsel for petitioner was not involved in this case until approximately January, 1981.

motion to dismiss and oral argument was held (L-17). The matter was then taken under advisement by the Bankruptcy Judge, Edward E. Davis.[4/]

For reasons never made clear to anyone, the referee held the motion to dismiss under "advisement" from July, 1976 until December, 1980.

On December 31, 1980, the referee dismissed the counterclaim concluding that a counterclaim "for negligence may not be liquidated in the Bankruptcy Court pursuant to § 57(d) of the Bankruptcy Act [of 1898]" (L-20).

Hydroculture then requested a rehearing. On January 30, 1981, without further hearing, Judge Davis vacated the December 30, 1980 dismissal. The referee stated that, while the court had "discretion" to hear the

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4/ To ease in distinguishing the Bankruptcy Judge from the District Judge, the Bankruptcy Judge will be referred to by his other commonly accepted title, "Referee".

counterclaim, it had previously determined the counterclaim would be "better liquidated" in state court. The referee, however, "thereafter" realized that, due to the lapse of time, the counterclaimant "may not" have a forum in which to adjudicate its claim. Thus, the court reversed itself (L-31). C&L, naturally, moved for reconsideration of the January 30, 1981 order (L-35).

On March 2, 1981, after oral argument, the referee again reversed himself and dismissed the counterclaim (see Appendix D). This dismissal proceeded under the fiction that the January 30, 1981 order had never existed. The March 2, 1981 order noted only the December 31, 1980 ruling and C&L's motion for rehearing (L-44).

Under this fiction, the court denied Hydroculture's motion for rehearing of the December 31, 1980 order (the one it really granted on January 30, 1981). In essence, the court held that the counterclaim was for "neg-

ligence" and was therefore not "provable" in Bankruptcy Court.

With this ruling, the participation of the referee in the case ended. A month later, the referee resigned from the bench and entered private practice.

Hydroculture perfected its "appeal" to the District Court in timely fashion. See, Rule 801, et seq., Rules of Bankruptcy Procedure (L-45).

The issues were briefed by both sides and oral argument was held before the Honorable Valdemar A. Cordova, United States District Judge for the Distrist of Arizona (CR 3, 5, 6).

On January 8, 1982, the District Court issued its order remanding this case to the Bankruptcy Court (see Appendix C). The court found that the Bankruptcy Court should have considered whether California or Arizona law applied and, by that exercise, determine whether or not the action was in tort (and

therefore not "provable" under § 63(a)(4)) or in contract (and therefore provable). If the referee found the claim to be provable, it then had another task; to determine whether the claim was "allowable" under § 57(d) of the Act. The court further noted that a claim is "allowable" if it is capable of being estimated within a time directed by the referee. The referee had never ordered any such procedure to take place. Finally, the District Court order also permitted the filing of a second amended complaint in the Bankruptcy Court which pleaded the professional malpractice claim in a more detailed fashion (CR 8).

C&L then moved for a rehearing (CR 10). Again, the parties filed memoranda and argued before Judge Cordova (CR 10, 12, 13).

On February 18, 1982, the District Court wholly reversed itself and dismissed (CR 15) (see Appendix B).

The petitioner appealed the District Court's decision to the Ninth Circuit

Court of Appeals. (The District Court had jurisdiction pursuant to Rule 801, et seq., Rules of Bankruptcy Procedure. The United States Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291; also see 11 U.S.C. § 47(a).) The Court of Appeals, in a cursory and unpublished memorandum opinion, affirmed the District Court's decision (see Appendix A).

From that decision, Hydroculture petitions this Court for a writ of certiorari to issue to the United States Court of Appeals for the Ninth Circuit in Cause No. 82-5287.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court (Rule 17.1(c)). There are still many current bankruptcy cases controlled by the Bankruptcy Act of 1898. Accordingly, this Court should decide this important question of federal law thereby resolving the issue for all other bankruptcy litigants.

SUMMARY OF ARGUMENTS

The bankruptcy referee and district court judge were both judicial officers of the same court of bankruptcy. Since the district judge and referee were judges of the same court, the Bankruptcy Act of 1898, as applied by the cases, required that the district judge reach independent conclusions as to applicable law. The conclusions reached by the referee were merely to be given such "respect" as was deemed appropriate by the district judge.

In this case, a motion to dismiss was submitted to the bankruptcy referee in July, 1976. The referee dismissed Hydroculture's counterclaim four and a half years later.

Upon reivew, the district judge refused to consider the choice of law question which surrounds the characterization of Hydroculture's counterclaim as contract or tort. As a judge of the same court, with complete review authority, the district judge should

have exercised independent review and erred in applying an "abuse of discretion" test to the actions of the referee.

Further, the district court erred in determining that even if it did consider a choice of law issue, it would be bound by principles of federalism to apply Arizona's characterization of an accountant's malpractice action as a tort action. Since courts of bankruptcy proceed under grants of original jurisdiction, they are not bound to apply Erie principles in deciding issues of this type.

The bankruptcy court is governed by principles of equity. Based upon those principles, even without resort to any state's choice of law, a court of bankruptcy would act properly in determining that Hydroculture's counterclaim against C&L sounded in contract and not in tort.

Actions arising out of contract are "provable" under the terms of the superseded Bankruptcy Act of 1898. Once having reached

the issue of provability of Hydroculture's counterclaim, a method should have been provided to either liquidate the claim or provide a manner for its reasonable estimation.

Principles of equity governing bankruptcy courts require that Hydroculture be permitted to proceed against C&L under a contract theory. Even should the Court wish to look to state law, then Hydroculture is prepared to demonstrate that California's law is at least as appropriate for consideration as that of Arizona. Under California law malpractice actions against accountants sound in contract or in tort, at the election of the plaintiff.

Finally, the court erred in not permitting an amendment of the counterclaim to plead the contract cause of action against C&L in a more expansive form.

The district judge basically took the position that although it might have ruled differently than the referee, the district

judge was bound to review the referee's decisions under an "abuse of discretion" test. All of the above reasons present a particularly compelling case for the exercise of this Court's power of certiorari.

ARGUMENT I

THE DISTRICT JUDGE ERRED IN APPLYING AN "ABUSE OF DISCRETION" TEST TO THE REFEREE'S CONCLUSIONS AS TO LAW, AND IN FAILING TO CONSIDER THE CHOICE OF LAW ISSUE. THE DISTRICT JUDGE WAS REQUIRED TO REACH INDEPENDENT CONCLUSIONS AS TO APPLICABLE LAW.[5/]

The United States District Court for the District of Arizona is (or was) a "Court of Bankruptcy". 11 U.S.C. § 1(10), 28 U.S.C. § 1334. The district court, as a court of bankruptcy, had those powers enumerated in 11 U.S.C. § 11. The "Bankruptcy Court" was made up of the district judges and referees of the Court of Bankruptcy, that is, the United States District Court for the District of Arizona. 11 U.S.C. § 1(9). Under the Bankruptcy Act, the referee was merely an

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5/ References to the law of bankruptcy are to the Bankruptcy Act of 1898, 11 U.S.C. § 1, et seq. [superseded]. The Bankruptcy Reform Act of 1978 replaced the Bankruptcy Act of 1898. Since this bankruptcy case was initiated prior to the effective date of the 1978 Code, the Bankruptcy Act of 1898 applies to all proceedings. See, Section 403(a), P.L. 95-598, Title IV, 11/6/78, 92 Stat. 2683.

officer of the Bankruptcy Court, appointed by the judges of the United States District Court. **Fish v. East**, 114 F.2d 177 (10th Cir. 1940); 11 U.S.C. § 62(a). Referees were not "judges" within the meaning of 11 U.S.C. § 1(20) or 28 U.S.C. § 25.

Referees were granted, by statute, all of the powers vested in the Courts of Bankruptcy (the district courts and district judges), "subject always to a review by the [district] judge". 11 U.S.C. § 66. The district judge had the power, sua sponte, to review and revise any and all orders of the referee. **Heiser v. Woodruff**, 150 F.2d 867, 868 (10th Cir. 1945). Thus, the bankruptcy referee was in no way a separate court, but merely an arm or branch of the district court. See, **In re Flanders Company**, 32 F.2d 654 (6th Cir. 1929); **Briggs v. Mays**, 125 F.2d 693 (8th Cir. 1942).

Since the referee was not a separate court, but merely a branch of the Dis-

trict Court, it was universally agreed that any conclusion as to law made by the referee was not entitled to any particular force and effect in a District Court. Instead, the rule was that a district judge could accept or reject as it chose, a referee's conclusions as to law. **Yutley v. SBA**, 304 F.2d 746, 749-750 (9th Cir. 1962). See also, **Bass v. Quittner, et al.**, 381 F.2d 54 (9th Cir. 1967); see also, **Walker v. Commercial National Bank of Little Rock, Arkansas**, 217 F.2d 677 (8th Cir. 1954). Even though a referee's conclusions as to applicable law were entitled to "respect" by the reviewing judge, the judge was required to make an independent determination of the law prior to approving the referee's conclusions. **In re Newcomb Interests, Inc.**, 171 F.Supp. 704 (N.D. Cal. 1959), aff'd 275 F.2d 350 (9th Cir. 1960).

In this case, the district judge stated that "it is not for this court to resolve this appeal by deciding whether this

court would have handled the matter differently or issued different orders; it is only for this court to decide whether Judge Davis proceeded and issued his order in accordance with the law" (CR 15).

The district judge clearly misidentified the scope of its review. It applied the "abuse of discretion" test postulated by C&L as applicable to the case (L-18, pp. 3-7).

Consequently, at a minimum, this case should return to the District Court since it has an independent duty to determine the applicable law, and it is not bound in any fashion by the previous rulings of the referee.

Moreover, the district judge erred in refusing to consider the choice of law issue. The District Court and the Bankruptcy Court were the same court and nothing prohibited the district judge from considering this issue.

When the district judge reviewed the proceedings which had taken place before the referee, he had an absolute right to take new evidence and to consider issues not raised before the referee. See **In re Cedor**, 337 F.Supp. 1103 (N.D. Cal. 1972); **In re Dunn**, 251 F.Supp. 637 (M.D. Ga. 1966); **In re Florsheim**, 224 F.Supp. 991 (D. Cal. 1938); **In re Samuel Wild's Sons**, 144 Fed. 972 (2nd Cir 1906); **In re Lawson**, 201 F.Supp. 710 (W.D. Va. 1962).

However, in its February 18, 1982 order, the District Court changed its mind and refused to even consider a choice of law issue, even though it had previously done so.

ARGUMENT II

HYDROCULTURE'S CLAIM AGAINST C&L FOR PROFESSIONAL MALPRACTICE AROSE FROM A CONTRACT AND IS A "PROVABLE" CLAIM IN BANKRUPTCY AND IS "ALLOWABLE" UNDER § 57(d) OF THE BANKRUPTCY ACT OF 1898.

Under § 63(a)(4) of the Act (11 U.S.C. § 103(a)(4) [superseded]), debts of a bankrupt and debts owed to the bankrupt may be proven against the estate if they "are founded upon ... a contract express or implied".

Appellant's claim against C&L arises from C&L's breach of contractual provisions relating to the manner in which it prepared appellant's financial statement.

A claim for damages resulting from a breach of contract is included in these provable claims. **Frederic L. Grant Shoe Company v. W. M. Laird Company**, 212 U.S. 445 (1909).[6/]

[6/] Section 68 of the Act makes the provisions of § 63 equally applicable, in reciprocal fashion, to counterclaims filed by the bankrupt against creditors. **Tindel v. Holgate**, 221 Fed. 342 (9th Cir. 1915).

Thus, at the start, the question is, what is the nature of Hydroculture's claim: tort or contract?

Hydroculture had argued that if California law were deemed applicable to this case, the action could proceed past "provability" to "allowability" because in California, professional malpractice actions are characterized as tort or contract actions at the election of the plaintiff. In Arizona, on the other hand, professional malpractice actions sound solely in tort. Compare, **Sato v. Vandenburgh**, 123 Ariz. 225, 599 P.2d 181 (1979), and **L. D. Laboratories, Inc. v. Mitchel**, 244 P.2d 385 (1952).

If the counterclaim is a tort, then it is probably not "provable" in bankruptcy. If the counterclaim is in contract, then it is provable under § 63(a)(4).

For the bankruptcy referee or District Court to elect to treat the claim as one in tort would be to defeat and disallow the

claim. On the other hand, if the claim is treated as a contract claim, it is provable.

However, not only did the court refuse to consider the choice of law issue, but in addition, the court stated that even if it considered the choice of law issue, to do so would be "futile" because upon any effort to decide the issue, Arizona law would have to control. Thus, the District Court erred in deciding that it would be bound by Arizona's classification of an action for accountant's malpractice as an action in tort.

It has been held that any claim which is recoverable either in law or in equity is provable in bankruptcy. **Garren v. Saccomanno**, 86 Idaho 268, 385 P.2d 396 (1963). The unliquidated nature of a contingent claim will not bar its provabability in bankruptcy and will not prevent its allowability, unless liquidation will require too much time and expense. **Scheefer v. Smith**, 469 F.2d 1256 (C.A. N.M. 1972).

Moreover, a bankruptcy judge cannot exercise unbridled authority in disallowing a claim merely because delay will result while the claim is being liquidated or estimated. **Matter of Cartridge Television, Inc.**, 535 F.2d 1388 (C.A. N.Y. 1976). The district judge abused his discretion when he upheld the Bankruptcy Court's determination that Hydroculture's claims were not "provable" nor "allowable", since he had a duty to make independent findings of fact and law on both issues.

In order for a claim to be pursued in a bankruptcy court, it must not only be "provable" but also "allowable", within the meaning of § 57(d) of the Act (11 U.S.C. § 93(d) [superseded]). Hydroculture has an unliquidated contract claim against C&L. The claim against C&L is "unliquidated" in the sense that its size has not yet been determined. An unliquidated claim is "allowable" under §57(d) if: (a) it is liquidated, or (b)

if the amount may be estimated "in the manner and within the time" directed by the court.

The first method of liquidating the claim would be to try the matter. **Matter of Hirth**, 189 Fed. 926 (D.C. Minn. 1911). Another method would be to arbitrate the size of the claim. See, Rule 919, Rules of Bankruptcy Procedure.

Short of actually liquidating the claim, the court or referee may allow a manner for its "estimation". (This is what the district judge had in mind in his first order remanding the case to the referee (CR 8).)

There is no question that a procedure for estimating the claim was never provided, either as to a method of estimating the claim or as to the time frame in which the claim should have been estimated (CR 8).

In the March 2, 1982 order, the district judge stated that the referee had the authority to "determine" that the claim was not capable of liquidation or estimation or

that permitting either would unduly delay the administration of the estate, and that he did so (CR 15).

The district judge read much into the muddle that is the set of orders issued by the referee.

In the December 31, 1980 order, the referee stated "the court concludes that the debtor's counterclaim for negligence may not be liquidated in the bankruptcy court pursuant to § 57(d) of the Bankruptcy Act". That order did not address the question of whether this amount might have been estimated or whether providing a method and a time in which to do so would have unduly delayed administration of the estate.[1/]

In the January 30, 1981 order, the referee apparently stated his court had dis-

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[1/] This lapse by the referee was particularly ironic in view of the fact that the referee had the matter "under advisement" for four and a half years.

cretion to hear the claim and would do so (L-31).

In the March 2, 1981 order, the referee stated that Hydroculture's counterclaim was not "provable in bankruptcy court pursuant to § 57(d)". (Actually, provability of claims is governed by § 63(a)(4).) In any event, in the March 2, 1981 order, the referee never reached the allowability issue (which is § 57(d)), deciding instead that the claim was not provable (L-44).

As has been mentioned, the district judge apparently proceeded on the basis that it had to accord to the referee the benefits of the abuse of discretion test. In doing so, the District Court erred. The District Court had the absolute authority and ability and, indeed, the duty to substitute its own views and beliefs as to the law.

ARGUMENT III

THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT HYDROCULTURE'S REQUEST TO AMEND ITS COMPLAINT

Hydroculture sought to amend it complaint to better plead its breach of con tract theory and to plead alternatively separate tort claim. The District Cour disallowed the amendment since it found, i light of its others rulings, that to permit a amendment would be an utter act of futility The amendment should have been allowed unde the usual amendment policy embodied in Rul 715, Rules of Bankruptcy Procedure (the sam as Rule 15, Federal Rules of Civil Procedure) **Sackett v. Beaman**, 399 F.2d 884 (9th Ci 1968). Thus, the District Court's refusal t allow an amendment further support petitioner's contention that this cas justifies the grant of certiorari by thi Court.

CONCLUSION

Ultimately, the question this Court must grapple with is whether it is right that Hydroculture have a forum to press its claim against C&L on the merits. The district judge, it is submitted, believed that such was the case. However, the district judge felt bound by the rulings of the referee and by his belief that he was required to rely on Arizona law. This Court has the power to right that wrong. It should exercise that power.

For all of the reasons stated in this petition, a writ of certiorari should issue to review the judgment of the United

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States Court of Appeals for the Ninth Circuit in Cause No. 82-5287.

Respectfully submitted this 2nd day of September, 1983.

HARRISON & LERCH, P.C.

By Mark I. Harrison

Mark I. Harrison
650 North Second Avenue
Phoenix, Arizona 85003
Tele: (602) 257-5800
Attorneysfor Petitioner

CERTIFICATE OF MAILING

STATE OF ARIZONA)
) ss.
County of Maricopa)

The undersigned, a Notary Public in and for the County of Maricopa, State of Arizona, hereby states that under the direct supersivion of Mark I. Harrison, Attorney for Petitioner, she caused to placed with Federal Express, a package containing the number of copies of the Petition for Writ of Certiorari addressed as follows:

The original and forty (40) copies were sent by Federal Express to:

Alexander Stevas, Clerk
1 First Street, N.E.
Supreme Court of the United States
Washington, D.C. 20543

and

Three (3) copies were placed in the United States Post Office at Phoenix, Arizona, with priority and first class postage fully prepaid to:

James R. Condo, Esq.
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Joseph A. Clark, III, Esq.
Associate General Counsel
Coopers & Lybrand
1251 Avenue of the Americas
New York, New York 10020

Attorneys for Respondent

The above-mentioned mailings were accomplished on the 2nd day of September, 1983.

Notary Public

My Commission Expires:
10/7/85

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HYDROCULTURE, INC. Plaintiff-Appellant-Counterclaimant. vs. COOPERS & LYBRAND, Defendant-Appellee	No. 82-5287 (D.C. No. CIV 81-434 PHX VAC) (B 75-306-L PHX ED) Memorandum

Filed June 7, 1983

Appeal from the United States Bankruptcy Court for the District of Arizona
Honorable Valdemar A. Cordova, District Judge, Presiding
Argued and Submitted January 10, 1983

Before: DUNIWAY, WRIGHT and CHOY, Circuit Judges

We do not view the bankruptcy judge's citation to § 57d in his March 2, 1981 order as a mistake; therefore, we read the order, as did the district court, to say that Hydroculture's counterclaim was not provable because it was not allowable under § 57d.

Whether the counterclaim was allowable under § 57d is a question within the

discretion of the bankruptcy court. See In Re THC Corp., 9 Cir., 1982, 686 F.2d 799, 803. We affirm the decision below because we agree that the bankruptcy judge acted within his discretion in finding that liquidation or estimation of the counterclaim would unduly delay the administration of the estate. The court's denial of leave to amend the complaint was not improper, because, even if recharacterized as a contract action, the counterclaim would have been no easier to liquidate or estimate. Equity does not demand a different result, particularly in view of the state court's ruling that the statute of limitations was tolled by the filing of the counterclaim in bankruptcy court.

Because we affirm the holding that the counterclaim was not "allowable" under § 57d, we need not reach any of the other issues Hydroculture raises.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

HYDROCULTURE, INC.	DATE 2/17/82
Plaintiff,	NO. CIV 81-434 PHX VAC
v.	B 75-306-L PHX ED
COOPERS & LYBRAND,	
Defendant.	

This matter having been under advisement,

IT IS ORDERED granting Appellee Coopers & Lybrand's motion for rehearing. The Court did not previously and does not now find that the Bankruptcy Court abused its discretion in ruling that Hydroculture's counterlclaim was not capable of liquidation or estimation regarding the application of § 57(d) of the Bankruptcy Act of 1898. This Court had previously concluded that the bankruptcy court should have ordered a manner and time for the estimation and liquidation of the claim. Under the circumstances when the bankruptcy court had this matter under advisement for a period of more than four years it may have been a better practice and more equitable for the bankruptcy court to have so ordered. However, this Court now concludes that § 57(d) does permit the Court to alternatively determine that the claim is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under the Act. Bankruptcy Judge Davis apparently did the latter which he had discretion so to do.

Further, it now appears that the choice of law issue was first raised by Hydroculture on appeal to this court. After due consideration the Court now concludes that it is proper to invoke the rule that matters which were raised forfthe [sic] first time on appeal should not be considered. It further appears that the choice of law issue would be futile in that Hydroculture's claim must be determined in accordance with the law of the forum -- Arizona. Appellant concedes that such is the law applicable to the district court but that the bankruptcy court may apply the law of another state under the facts of this case. This Court is constrained to disagree. The Court recognizes that the unusual delay of approximately four and one-half years before Judge Davis ruled is the occasion for the possible loss of Appellant's claim and it is not for this court to resolve this appeal by deciding whether this court would have handled the matter differently or issued different orders; it is only for this court to decide whether Judge Davis proceeded and issued his order in accordance with the law.

Under the circumstances presented by the record since the Bankruptcy Judge denied appellant's motion for leave to amend after he had ruled that the claim was not capable of liquidation, it can be reasonably concluded that it would have been a futile act for appellant to amend to allege a contract breach. The denial of the motion to amend the first amended complaint was therefore not an abuse of discretion.

IT IS THEREFORE ORDERED vacating this Court's order of January 8, 1982 and affirming the decision rendered by the Bankruptcy Court on March 2, 1981 dismissing appellant's first amended complaint and

denying Hydroculture's leave to amend that pleading.

/s/ Valdemar A. Cordova

United States District
Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IN RE:
Hydroculture, Inc.,

Hydroculture, Inc.,

Plaintiff,

vs.

Coopers & Lybrand,

Defendant.

CIV-81-434-PHX-VAC
B-75-306-L-PHX-ED
JUDGMENT

Filed January 8, 1982

This action came on for consideration before the Court, the Honorable Valdemar A. Cordova, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED reversing the order of the bankruptcy court and Remanding [sic] this matter with instructions to permit the filing of a second amended complaint and then determine and make findings on the choice of law and allowability issues.

Dated at Phoenix, Arizona this 8th day of January, 1982.

W. J. Furstenau, Clerk

By: /s/Janine L. Duffy
Deputy Clerk

cc to: Stephen M. Dichter
Warren E. Platt

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In the Matter of HYDROCULTURE, INC., Debtor.	CIV 81-434 PHX VAC
HYDROCULTURE, INC., Plaintiff-counterclaimant, v. COOPERS & LYBRAND, Defendant.	B-75-306-L-PHX-ED ORDER

Filed January 8, 1982

This matter has been under advisement and is before this Court on appeal from the rulings and order of the Bankruptcy Court.

The appellant in this case is Hydroculture, Inc., who prior prior [sic] to 1973 had orally contract with appellee, Coopers & Lybrand (C&L), an accounting firm, to provide certain accounting services. In

February of 1975 Hydroculture filed a voluntary petition for arrangement pursuant to Chapter XI of the Bankruptcy Act of 1989 [sic]. On September 2, 1975 the public accounting firm of Coopers & Lybrand filed a claim as a creditor of Hydroculture seeking to recover for professional services rendered in the amount of $34,688.65.

On or about November 4, 1975 Hydroculture filed an objection to allowance of claim and demand for relief and sought judgment against C&L in an unspecified sum for damages against C&L for an improper change in accounting methods. C&L then filed a motion for a more definite statement to have Hydroculture specify its theory of liability on which it sought relief and the nature and extent of the alleged damages sustained. With the Bankruptcy Court's consent, Hydroculture filed its "first amended complaint" on July 2, 1976. Hydroculture's first amended complaint alleged that its damage was occasioned as a

direct and proximate result of the careless and negligent acts of C&L.

On July 29, 1976 the appellee filed a motion to dismiss the first amended complaint on the ground that the claim was an unliquidated tort claim and therefore not provable under Section 63 (11 U.S.C. §103) and Section 68 (11 U.S.C. §108) of the Bankruptcy Act, nor was it an allowable claim within the meaning of Section 57 (11 U.S.C. §93) of the Bankruptcy Act.

Thereafter the Bankruptcy Judge, the Honorable Edward E. Davis, had the motion to dismiss under advisement for approximately four and one-half years. On December 31, 1980 Judge Davis entered an order dismissing Hydroculture's first amended complaint. It further appears that during the period of four and one-half years during which the motion to dismiss was under advisement, the statute of limitations in Arizona expired on Hydroculture's claims.

On January 30, 1981 after oral argument on a motion for rehearing which was filed by Hydroculture, Judge Davis vacated his order of December 31, 1980, apparently because the order left Hydroculture without a place to present it claim.

On February 11, 1981 C&L moved to vacate the order of January 30, 1981 and after oral argument Judge Davis, on March 2, 1981, ruled that Hydroculture's first amended complaint stated an unliquidated tort claim for negligence which was not provable in bankruptcy court pursuant to Section 57(d). In so doing, the bankruptcy court concluded that Hydroculture's claim was not capable of liquidation or estimation and, therefore, should not be allowed.

The Court also proceeded to deny Hydroculture's request to file a second amended complaint. Hydroculture then appealed the bankruptcy court order of March 2, 1981 which ruled that Hydroculture's first amended

complaint was not provable in bankruptcy and which order further denied Hydroculture's motion to file a second amended complaint.

It appears to be recognized by the parties that claims based upon breach of contract are "provable" in the bankruptcy court while claims arising from torts are not "provable" unless liquidated prior to the institution of bankruptcy proceedings.

It further appears that Hydroculture is a domiciliary of Arizona and that in Arizona such an action sounds solely in tort. Sato v. VanDenburgh, 123 Ariz. 225, 599 P.2d 181 (1979). C&L is a domiciliary of New York where the law is set forth in Stanley L. Bloch, Inc. v. Klein, 258 N.W. [sic] Supp.2d 501 (1965) which stated that such an action sounds either in contract or in tort. California follows the same rule as New York in that an action for professional malpractice lies either in contract or tort. L.D.

Laboratories, Inc. v. Mitchell, 244 P.2d 385 (1965).

Appellant, Hydroculture, contends that this case presents a choice of law issue and that a determination must bemade as to whether or not the law of Arizona, New York or California applies and that this determination is appropriately made by the bankruptcy court. To date, apparently no evidence has been adduced or presented on any of these issues nor has the bankruptcy court made such a decision.

It appears clear then that upon a determination of the choice of law issue that if the Arizona law is to apply that Hydroculture's claim may not be "provable" and that dismissal may then be appropriate. On the other hand, if the complaint were amended and the evidence demonstrated that either New York or California law applies the counterclaim may possibly be "provable".

Regarding the allowability of the

claim Section 57(d) of the Act provides in pertinent part as follows:

> ". . . an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act."

The Court below never directed the parties to estimate the amount of the alleged unliquidated or contingent claim and did not specify a time within which to do so. A fair

reading of the statute would lead this Court to conclude that an unliquidated claim may be allowable if it is capable of being estimated within a time and manner directed by the Court.

Regarding the denial of the motion to amend the complaint, it would seem reasonable and fair that the same be permitted under the circumstances here presented. If the action of Hydroculture is one which may lie in contract, then the amendment should be fully permissible.

IT IS THEREFORE ORDERED reversing the order of the bankruptcy court and remanding this matter with instructions to permit the filing of a second amended

. . . .

. . . .

. . . .

complaint and then determine and make findings on the choice of law and allowability issues.

DATED this 7th day of January, 1982.

/s/ Valdemar A. Cordova
Valdemar A. Cordova
United States District Court.

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re	
	Case No.
HYDROCULTURE, INC.,	B-75-306-L-PHX-ED
Debtor.	
HYDROCULTURE, INC.,	
Plaintiff-Counterclaimant,	
v.	ORDER DISMISSING COUNTERCLAIM AND ORDER DENYING AMENDMENT TO COMPLAINT
COOPERS & LYBRAND,	
Defendant.	

Filed March 2, 1981

This matter arises from the motion of the debtor, Hydroculture, Inc. for a rehearing of Coopers & Lybrand's motion to dismiss the debtor's counterclaim. The debtors filed a counterclaim seeking to recover from Coopers & Lybrand for its alleged negligence and carelessness in performing services for the debtor prior to the debtor's filing its petition. On December 31, 1980

this court entered an order granting the motion of Coopers & Lybrand to dismiss the counterclaim, finding that pursuant to §57d of the Bankruptcy Act, 11 U.S.C. §93d (1973), the debtor's counterclaim for negligence was not capable of liquidation in the Bankruptcy Court. The debtor filed its motion for a rehearing on January 27, 1981, which, upon its finding of excusible neglect, was deemed timely by the court.

The hearing on the debtor's motion was held on February 18, 1981. At that hearing the court, pursuant to Fed. R. Civ. P. 60(b)(6), vacated its order of December 31, 1980 dismissing the debtor's counterclaim. The debtor also moved the court for permission to amend its first amended complaint.

After consideration of the arguments of counsel and the memoranda of the parties the Court concludes that the debtor's motion for a rehearing must be denied. Section 63 of the Bankruptcy Act, 11 U.S.C.

§103 (1973), delineates the types of debts that may be proved and allowed in bankruptcy court. With limited exceptions tort claims are not provable debts. To constitute a provable debt the tort claim must have been reduced to judgment, 11 U.S.C. §103a(1) (1973), or must be a claim for negligence upon which an action was commenced prior to and that is pending at the time the petition is filed, id. at §103a(7), otherwise the tort claim is not provable in bankruptcy court. Section 57d, 11 U.S.C. §93d (1973), provides that claims that are not duly proved may not be allowed.

The debtor's amended complaint states a claim for the tort of negligence; thus, to be a provable claim an action to recover on the negligence claim must have been commenced before and have been pending at the time the debtor filed its petition, which it was not. The Court therefore concludes that the debtor's counterclaim for negligence, as

plead in its first amended complaint, is not provable in bankruptcy court pursuant to §57d and hereby orders that the motion of Coopers & Lybrand to dismiss the counterclaim is granted and the debtor's counterclaim is dismissed. Finally, the motion of the debtor to amend its complaint is hereby denied.

Dated: 2 March 1981

/s/ Edward E. Davis
U. S. Bankruptcy Judge

Copies of the foregoing
mailed this 2nd day of
March, 1981, to:

James R. Condo, Esq., 3100 Valley Center,
Phoenix, AZ 85073
Stanford E. Lerch, Esq., 650 No. Second Ave.,
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Phoenix, AZ 85004

By /s/ Phyllis J. Ward
Deputy Clerk

APPENDIX E

APPENDIX E

11 USC § 103(a)(4) (§ 63(a)(4) of the Bankruptcy Act of 1898):

> "(a) Debts of the bankrupt may be proved and allowed against his estate which are founded upon . . .
>
> . . .
>
> (4) A contract express or implied."

11 USC § 93(d)(§ 57(d) of the Bankruptcy Act of 1898):

> (d) Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: Provided, however, That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this title.